No. 88-762

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In the Supreme Court of the United States

October Term, 1988

O. GEORGE SPECHT, JR. AND JUNE B. SPECHT,

Petitioners,

v.

ROGER JENSEN, DOUG MARTIN AND DON OWENS,

Respondents.

On Petition For Writ Of Certiorari To United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The petition presents no issue that warrants this Court's consideration and accordingly should be denied. The Tenth Circuit's *en banc* opinion for which review is sought is reported at 853 F.2d 805.

COUNTERSTATEMENT OF THE CASE

The questions presented by Petitioners set forth no legal issues that warrant this Court's consideration and fail to address the only issue considered by the Tenth Circuit, *en banc*, to wit:

> Whether Fed. R. Evid. 702 permits an attorney, called as an expert witness in a 42 U.S.C. § 1983 action, to state his views of the law which governs the verdict and opine whether police officers' conduct violated that law.

Petitioners asserted claims under 42 U.S.C. § 1983 alleging unconstitutional searches of Petitioners' home and office allegedly occurring while private repossessors attempted (pursuant to a court order) to reclaim a computer. Respondents are police officers who directed or were directed to keep the peace regarding same. To prove their claim, Petitioners offered for expert testimony an attorney, Daniel Sears, who specialized in criminal law including Fourth Amendment searches. Petitioners' attorney represented to the trial court that Sears would: (1) be qualified as an expert in the area of search and seizure, constitutional law and criminal procedure; and (2) be asked hypothetical questions to obtain his opinion regarding a) whether a search took place in both the home and the business, b) whether there was a consent to search, c) what constitutes a proper search, and d) whether exigent circumstances existed (Vol. VI, 368-69).

Respondents made a lengthy record objecting to Sears' proffered testimony (Vol. VI, 373-87). Prior to Sears testifying, the trial court inquired of Petitioners' counsel, "Now, are you indicating that this is an area of a *fact*

that he is going to give opinion on?" (Emphasis added.) Petitioners' counsel responded:

> First of all, I don't think it's limited any more under the expert witness law that you couldn't call an expert to testify to his opinion of the law. So that's my first response; but yes, I believe that this is an area of fact. I'm going to give him a hypothetical set of facts that are based on the evidence. Based upon those facts, I'm going to ask him if it's his opinion based upon those facts that these various things took place: (1) a search; (2) a consent search, or whether consent was voluntary, and (3) and finally, that without one of those two and without exigent circumstances—and I'll ask him whether he believes there were exigent circumstances at both—in both instances [the search of business and the search of residence] —based upon the lack of those three things, what kind of a search was this in his opinion. And he will say that in his opinion, it was an *illegal* search based on those facts (emphasis added).

(Vol. VI, 369-70) Thus, it was made clear from the start that Sears' testimony would involve legal concepts of search, consent, exigent circumstances and, ultimately, an opinion that it was an *illegal* search, notwithstanding Petitioners' assertion that such concerned matters of fact.

Direct-examination by Petitioners' counsel included the following legal opinions of Sears (references are to App. C):

- "It is normally recognized that warrantless entry into any premises are per se unreasonable and constitute an unlawful search." p. 62.

* "[I]f the people whom you have indicated were approached with regard to gaining access to the premises did not have the authority to consent to a search, then the entire episode, the entry into the premises, the subsequent search and inspection of the premises, would constitute an unlawful search." p. 62.

* In responding to a question concerning to which areas of Petitioner's office his legal conclusions would apply, Sears testified: "If there is no consentual—if there is no free and voluntary consent by an authorized person to give access to the premises, then it would include all portions inside the building, both common areas as well as the private areas of any individual whose premises are searched." p. 62.

* After Petitioners' counsel set forth a second hypothetical which recapped the facts from Petitioners' point of view, attorney Sears said that, "Yes, I would conclude a search did take place." p. 63.

* "First of all, as I indicated in my initial response with regard to the search of the business premises, it must start from the basic premise that any warrantless search is per se unreasonable. From that point forward, again, there are various exceptions to that doctrine which may make a search lawful.

  "As applied to these facts, it would be my understanding that a search could be conducted only on several bases: First of all, if there was probable cause to believe that the property that was being sought is on the premises and if there is exigent circumstances to believe that either the property is going to be removed or evidence is going to be destroyed, then an entry could take place on that basis. The only other basis that

I'm aware of would be on a consensual basis; and a consensual search must be premised on a free and knowing waiver of the right to refuse to consent to a search. And if that is preceded by any colorable claim of authority, such as process which is not tantamount to a valid search warrant, any subsequent search, which I've already indicated took place, would be unlawful."

Question: "Do I understand, then, your opinion to be that there was not a consensual search?"

Answer: "That is correct, based upon the submission of the process apparently to Mrs. Specht, on the basis of your indication it was not a valid search warrant, on the basis of the announcement that there was an intention to search for property. On those bases, I would submit that there was no free and knowing consent entered on the basis of the facts that have been presented." pp. 63-64.

* "It would be my opinion that all persons that entered the premises conducted a search . . . [on the basis that] the initial invitation, if it may be called that, of Officer Owens to enter the premises was not tantamount to a consensual search. If there was not a further invitation extended to the other individuals, certainly their rush into the premises would be an unlawful intrusion. Any sightings or observations that took place, any wanderings through the premises, would be tantamount to an unlawful search." p. 65.

Sears gave further legal opinions under direct examination which were not set forth by Petitioners in Appendix C[1] (references are to Vol. III of the record below):

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[1]Representation by Petitioners that Appendix C constitutes the "entire testimony" of Sears on direct examination (Pet. 3, 62) is incorrect.

- "There is another doctrine as an exception to a warrantless search which legitimizes what is called 'plain-view observations.' The difficulty with that doctrine under this set of circumstances is that an officer has to be where he has a right to be before observations can be deemed an exception to a warrantless search or an unreasonable search." p. 55, ll. 14-19.

- When asked if his opinion would change if Mrs. Specht had in fact invited the persons into her home, Attorney Sears replied that "[i]t would change only if I knew Mrs. Specht knew she had a right to refuse their entry, if they had stated their purpose for being there, if she was aware that they were there to search the premises, if she was fully aware of all attendant rights, including the right to refuse their entry. . . . After all those conditions were satisfied, then she would be in a position to consent to search." p. 55, l. 23 through p. 56, l. 6.

- Petitioners' attorney asked Mr. Sears to assume that if Mrs. Specht was not aware of her right to refuse entry and "wasn't advised of those rights, would your opinion as to the search occurring, the legality of the search, or the consent of the search change?" Sears responded that "my opinion would not change." p. 56, ll. 13-23.

- "It would be my conclusion that it was the joint activity of all persons who entered the premises." p. 57, ll. 19-20.

At this point, Respondents' counsel commenced cross-examination of Sears. Of necessity this examination afforded Sears the opportunity to express further legal opinions; however, Respondents' counsel had no choice but to conduct such examination in light of Sears' testimony per-

mitted in direct examination (references are to Vol. III of the record below):

- "If there is an owner or possessor of the premises that has joint occupancy of the premises, that person may be in a position to consent to a search." p. 102, ll. 16-18.

- "A search can be accomplished if someone is standing with their eyes opened in a place where they have no right to be." p. 109, ll. 13-14.

- "[I]t would be my—it is my opinion that once the other four officers entered without invitation that there was joint action on behalf of all five of them, and it was an unlawful intrusion. The clearest factor that in my opinion turns any invitation that was extended into an unlawful intrusion by Officer Owens is when he demonstrates that he is there to search for a computer and that he has a court order, which was not a valid search warrant." p. 113, ll. 3-10.

- Question: "How do you find . . . [the private repossessor's] actions to be actions pursuant to state authority?"

  Sears: "Because he was acting in concert with state law enforcement officers." p. 113, l. 24 through p. 114, l. 2.

- When asked what "acting in concert" meant, Sears testified as follows: "A knowing participation in the endeavor. Now you want me to outline the facts that I relied upon? * * * It would be on the basis that there was apparently joint activity after Officer Owens was on the premises of the other four to enter."

  Question: "Through prior agreement with Officer Owens?"

  Sears: "Certainly tacit agreement by their actions. * * * It would be my position on the basis

that there is an unlawful intrusion when the other four entered the premises that until and unless there is an indication that one or more of them are withdrawing from the participation of the activity inside that yes, they have joined in concert with that single purpose." p. 115, ll. 8-9 and p. 115, l. 23 through p. 116, l. 2 and p. 116, l. 22 through p. 117, l. 2.

Redirect-examination by Petitioners' counsel:

* After Petitioners' counsel added two pages of additional assumptions regarding the search of Mr. Specht's office, Sears responded, "[a]s to my conclusion as to whether an unlawful search was conducted under those circumstances, my opinion would not change." p. 124, ll. 3-5.

* "And even if that person [who allowed certain defendants to enter the office building] had the authority and the standing to consent to a search, it would be my conclusion that that consent was obtained under a colorable claim of authority and therefore no valid consent could enter." p. 124, ll. 14-18.

* "As I indicated, even assuming that Mrs. Specht's invitation to Officer Owens to enter . . . [her house] at that point in time was free and knowledgeable, the subsequent entry of the officers vitiated any consent for entry on onto the premises; and any search thereafter that was conducted by walking through the premises, observing the contents within the living accommodations, would not be plainsight observations by officers or individuals who were in a position where they had a right to be. And considering all the circumstances that have been presented to me during the course of the hypothetical questions, it is my firm judgment that there was no consensual search afforded the officers." p. 126, ll. 8-19.

- "Since the initial entry was illegal, it would be my conclusion that any acts, any further intrusions into the premises, were also unlawful." p. 126, ll. 20-22.

- Question: "Assume an additional fact . . . that Mrs. Specht didn't know the difference between a search warrant and a court order to search. Would that change your opinions in any way?"

  Answer: "No. Again I believe we go back to my first response this morning that by presentation of some claim of authority, the officers, unless that claim is afforded by a valid search warrant—any consent that is sought is obtained under a colorable claim of authority. . . ." p. 126, l. 23 through p. 127, l. 6.

- Question: "Assuming these additional facts that I have given to you today as to the residence, would that in any way—would they in any way change your opinion that the search at the residence was a joint action participated in by all five parties?"

  Answer: "No."

  Question: "And as to Hampden Industries, assume the new facts that I gave you as to Hampden Industries. Would those new facts in any way change your opinion as to the participation of the one officer now and the three persons from the Denver area [the private repossessors] as to their joint action and participation in the search?"

  • • •

  Answer: "No." p. 127, l. 18 through p. 128, l. 2 and l. 22.

- "[A]n unlawful search was conducted of Hampden Industries and all the premises located within that common building." p. 128, ll. 24-25 through p. 129, l. 1.

- When Petitioners' attorney asked Sears what his opinion meant concerning the participation of the police officers, Sears responded:

  "That would be pursuant to my conclusion that there was joint activity and that all persons were involved in an unlawful search."

  Question: "And yesterday in response to . . . [Respondent attorney's] questions, I believe you—in response to his question about state action, in your opinion, does that constitute state action, in these two instances?"

  Answer: "Yes." p. 129, ll. 13-20.

- When Petitioners' attorney asked Sears specifically with respect to his understanding of the law and whether Sears' opinions would change as it related to Sears' understanding of the law as it existed in 1978, 1980, 1982, 1984, Sears answered his opinions would be the same, "[b]ased upon my reading of the law. . . ." p. 130, ll. 10-24.

Recross-examination by Respondents' counsel:

- Question: "Mr. Sears, do you agree that all your opinions . . . depend on two things: (1) your understanding of the facts as have been given to you by . . . [Petitioners' counsel], and (2) your understanding of the law as it applies to those facts?"

  Answer: "Yes." p. 131, ll. 7-13.

- Question: "Cutting through all the gobbledygook, if they say they're there to pick up a computer, she invites them in, are they in there by consent?"

  Answer: "Not under those limited circumstances, no."

  Question: "Not in your opinion, anyway?"

Answer: "No."

Question: "And in making that statement, you're presuming what the law is to those sets of facts. I mean you have to."

Answer: "I am rendering an opinion on my basis—on the basis of my understanding of the current law and the progression of law of search and seizure over the last number of years." p. 132, l. 16 through p. 133, l. 1.

* Question: "Have you ever been known to disagree with the court as to what the law of the circuit is?"

Answer: "Absolutely."

Question: "All right. So you're not saying that you can affirm to this jury that your understanding of the law is going to be identical to . . . [the trial court's] understanding of the law is in this area?"

Answer: "[The trial court's] . . . understanding of the law is controlling in this case." p. 133, ll. 7-15.

* At pages 135 through 139, Respondents' counsel questioned Sears hypothetically regarding whether a teacher's entrance into a student's locker constituted a Fourth Amendment search, which included this colloquy:

Question: "Now, is it your understanding of the state of the law . . . that if a law enforcement officer merely facilitates the search by a private individual that that private individual was otherwise going to undertake anyway, in your opinion, is that prohibited under the Fourth Amendment?"

Answer: "I believe it is . . . ." p. 137, l. 20 through p. 138 l. 2.

* Along these same lines as above regarding whether state action occurred, Sears stated that "I don't think it has to be at the direction or control of [a] police officer. At least that's not my understanding . . . . It's a matter of whether it is jointly participated in with law enforcement agents." p. 141, ll. 10-13.

Redirect-examination by Petitioners' counsel:

* Question: "Mr. Sears, in talking about this purpose between the private individual and the police officer, does this purpose have to be to conduct a search, or can it be some other common motive, such as seeking the recovery of a computer?"

  Answer: "Well, . . . under the circumstances presented here, I don't characterize any difference." p. 142, ll. 20-25.

* Question: "Would it be correct, then, under the facts as you know them, as I have given them to you, as I have asked you to assume, that none of your opinions would change, then, as to the reasonableness of the search, [and] the participation of the parties? Is that correct?"

  Answer: "That's correct."

  Question: "It's your opinion that you found this common purpose. It that correct?"

  Answer: "Based upon the facts that have been revealed to me, yes." p. 143, ll. 4-12.

* Sears: "My understanding is that there were pronouncements both from law enforcement as well as Mr. Jacobs that the intent was to search; and I deem that to be a concert of action with a common purpose."

  Question: "And the facts, then, as I gave them to you, after hearing them as to actually what

happened—would you deem that to be either concert of action or joint activity?"

Answer: "That would be my conclusion, yes." p. 143, l. 19 through p. 144, l. 1.

* In response to an inquiry by Petitioners' attorney whether it mattered if an officer or private person was the leader, Sears responded: "Well, . . . again, as I understand the law in this area, you have to evaluate the totality of the circumstances; and I think you have to evaluate the activity that was participated in by all the individuals. So, no, it does not alter or change my opinion." p. 144, ll. 9-13.

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ARGUMENT

The Tenth Circuit *en banc* properly recognized and applied legal principles consistent with those recognized by circuit courts throughout the country. First, it noted that Rule 702 does not permit an expert to encroach upon the trial court's authority to instruct the jury on the applicable law, stating "it would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law, and it would intolerably confound the jury to have it stated differently" (App. B 42). The court further referred to Fed. R. Evid. 704 and its advisory notes that make clear that opinions which merely tell the jury what result to reach or that are phrased in terms of inadequately explored legal criteria are prohibited. Finally, the court below recognized that "testimony which articulates and applies the relevant law . . . circumvents the jury's decision-making function by telling it how to decide

the case" (App. B 43). The court properly concluded that "the expert in this case was improperly allowed to instruct the jury on how it should decide the case" (App. B 44). The rationale of the Tenth Circuit is not in conflict with any circuit court.

The Tenth Circuit recognized that a witness may properly be called upon to aid the jury in understanding the facts and evidence even though reference to those facts is couched in legal terms (App. B 46). The court noted that an expert's testimony is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury must exercise its fact-finding function (App. B 47). It then stated:

> However, when the purpose of testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed. In no instance can a witness be permitted to define the law of the case (App. B 47).

The legal principles enunciated by the court below are in conformity with the decisions of the circuit courts throughout the country. The most often cited case authority relating to the admissibility of legal opinion is *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505 (2nd Cir. 1977), *cert. denied*, 434 U.S. 861 (1977). The *Marx* court considered whether the trial court properly admitted the testimony of a securities attorney regarding legal standards. The appellate court recognized that the expert, having been qualified in the area of securities regulation, was competent to explain practices ordinarily followed by lawyers and corporations in shepherding a registration statement through the SEC. *Id.* at 508-09. However, it found reversible error where the expert testified not only as to the

customary practices of the trade, but as to the legal standards he believed derived from a contract that should have governed defendants' conduct. *Id.* at 509. The court noted that the expert not only construed the contract, but "repeatedly gave his conclusions as to the legal significance of various facts adduced at trial" (*id.* at 510)—precisely what the trial court below permitted Sears to do.

The *Marx* court made clear that such legal opinions would not have been otherwise admissible even if the witness had been qualified as an expert in contract law, stating:

> It is not for witnesses to instruct the jury as to applicable principles of law, but for the judge. As Professor Wigmore has observed, expert testimony on law is excluded because "the tribunal does not need the witness' judgment . . . [T]he *judge* (or the jury as instructed by the judge) can determine equally well . . ." The special legal knowledge of the judge makes the witness' testimony superfluous. VII *Wigmore on Evidence* § 1952, at 81.

Id. at 509-10 (emphasis in original).

The *Marx* court explained why expert legal opinions were superfluous:

> As Professor McCormick notes, such testimony "amounts to no more than an expression of the [witness'] general belief as to how the case should be decided." *McCormick on Evidence*, § 12 at 26-27. The admission of such testimony would give the appearance that the court was shifting to witnesses the responsibility to decide the case. *McCormick on Evidence* § 12, at 27. It is for the jury to evaluate the facts in the light of the applicable rules of law, and

> it is therefore erroneous for a witness to state his opinion on the law of the forum.

Id. at 510.

Significantly, the Second Circuit in *Marx* recognized the danger inherent in cross-examination under such circumstances:

> [C]ompelling the opponent to cross-examine to repair the damage is to invite disaster, for much will turn on the obstinancy of the expert, and repetition before a jury, especially on cross-examination, is likely to impress the jury. The applicable law, not being foreign law, could, in no sense, be a question of fact to be decided by the jury.

Id. at 511.

The Sixth Circuit in *United States v. Zipkin*, 729 F.2d 384 (6th Cir. 1984), followed *Marx* in finding reversible error in permitting a bankruptcy judge to testify as an expert witness on matters of law, to wit, his understanding of the Bankruptcy Act and the meaning of a written order he had issued. Holding the admission of such testimony regarding questions of law to be both improper and prejudicial, the court stated:

> It is the function of the trial judge to determine the law of the case. It is impermissible to delegate that function to a jury through the submission of testimony on controlling legal principles.

729 F.2d at 387. While the prosecution argued that any error was not prejudicial because defense counsel demonstrated on cross-examination that the bankruptcy judge's view of the law was erroneous, the *Zipkin* court disagreed, stating:

> Although defense counsel made a diligent effort to discredit Judge Ray's direct testimony, we cannot conclude that there was no prejudice. The testimony of Judge Ray included his legal conclusions. These are not a proper subject of testimony and their prejudicial effect substantially outweighed any probative value they might have had. In effect Judge Ray's testimony amounted to a statement that under the applicable law the defendant was guilty.

Id.

Notwithstanding that *Zipkin* arose in a criminal context, it is indistinguishable from the case at bar. Cross-examination only served to compound the prejudice to Respondents.

Marx and *Zipkin* are but two examples of federal appellate courts uniformly recognizing the inadmissibility of expert testimony concerning principles of law. *See, e.g.*, **Second Circuit**: *DiBella v. County of Suffolk*, 574 F.Supp. 151, 152-54 (E.D.N.Y. 1983), *aff'd*, 762 F.2d 990 (2d Cir. 1985) (exclusion of expert testimony of assistant district attorney regarding what constitutes probable cause was proper because such testimony is inadmissible under Rules 701 and 702 in that it was not helpful to trier of fact and concerned a subject for which expert testimony was not appropriate); **Fourth Circuit**: *Adalman v. Baker, Watts and Co.*, 807 F.2d 359, 365-68 (4th Cir. 1986) (affirming the inadmissibility of legal testimony regarding securities laws disclosure); **Fifth Circuit**: *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 239-40 (5th Cir. 1983) (trial court properly sustained objection to question by defendant of its own expert as to cause of accident because question sought from witness concerned his opinion as

to legal, not factual, cause of accident); **Sixth Circuit**: *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210 (6th Cir. 1987) (a witness may not instruct the jury as to applicable principles of law since that is the responsibility of the judge); *Torres v. County of Oakland*, 758 F.2d 147, 151 (6th Cir. 1985) (error to allow legal testimony as to what constitutes "discrimination," but error harmless because "only one brief question out of a rather lengthy trial"); *Stoler v. Penn Central Transportation*, 583 F.2d 896 (6th Cir. 1978) (no abuse of discretion in prohibiting expert witness from testifying he believed crossing was "extra hazardous" since the expert was being asked for what amounted to a legal opinion); **Seventh Circuit**: *Loeb v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969) (no error in trial court's refusal to allow an attorney to testify as to the legal significance of various papers signed by the parties); **Eighth Circuit**: *Hogen v. American Telephone & Telegraph Co.*, 812 F.2d 409, 411-12 (8th Cir. 1987) (expert legal opinion on what constitutes discrimination inadmissible because "discriminate" is a legal term); **Ninth Circuit**: *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454, 461 (9th Cir. 1986) (distinguished the permissibility of expert opinion regarding rules of New York Stock Exchange and National Association of Security Dealers from the impermissibility of expert opinion on federal law, as to which federal judges are authority); *Cooley v. United States*, 501 F.2d 1249, 1253-54 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975) (in the orderly trial of a case, the law is given to the jury by the court and not introduced as evidence, recognizing it would be most confusing to a jury to have legal material introduced as evidence).

Thus, the Second, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Circuits are not in conflict with that which the court below held: that opinion evidence on the governing law and the expression of legal coonclusions are inadmissible.

It is clear that if legal testimony such as Sears' were permitted, each side of a controversy would present its own legal expert. All of the problems inherent in permitting Sears' testimony would be compounded, and the resulting confusion to the jury and invasion of the court's province would be exacerbated.

The Second Circuit in *United States v. Ingredient Technology Corp.*, 698 F.2d 88 (2d Cir. 1983), recognized the problem:

> [I]t would be very confusing to a jury to have opposing opinions of law admitted into evidence as involving a factual question for them to decide.

698 F.2d at 97. *See also, United States v. Curtis,* 782 F.2d 593, 599 (6th Cir. 1986).

Presumably, if expert legal opinion were to be permitted, a legal expert could render legal conclusions on any legal issue arising in a § 1983 case. The following are examples: whether the officers acted in good faith or had qualified immunity from suit, whether their conduct constituted excessive force, whether a false arrest occurred, or whether the conduct rose to a level of constitutional deprivation. In short, litigation under § 1983 would deteriorate into a battle of legal experts, leaving in shreds the basic tenet that the federal judge is the final arbiter

of federal law and leaving the jury in a morass of confusion.

As the *Marx* court cautioned in the context of securities litigation:

> With the growth of intricate securities litigation over the past forty years, we must be especially careful not to allow trials before juries to become battles of paid advocates posing as experts on the respective sides concerning matters of domestic law.

550 F.2d at 511.

The growth in recent years of intricate § 1983 litigation has matched the growth of intricate securities litigation. The necessity for special care to avoid such potential battles of legal experts, recognized by the *Marx* court, is just as applicable to § 1983 cases as it is to security cases.

Where Sears applied his understanding of the law to assumed facts, his testimony consisted of improper legal conclusions. *See United States v. Jensen*, 608 F.2d 1349, 1356 (10th Cir. 1979); *see also*, Comment, *Expert Legal Testimony*, 97 Harv. L. Rev. 797, 797 (1983-84) ("[I]t remains black-letter law that expert legal testimony is not permissible").

The following analysis of Sears' testimony focuses primarily on direct examination because cross-examination, redirect-examination and recross-examination of Sears merely compounded the problems presented in the direct testimony, as the *Marx* court predicted would occur. *Marx*, 550 F.2d at 511. Sears' testimony began with three pages of hypothetical facts regarding the alleged search at

Mr. Specht's office (Vol. III, 42-45).[2] Sears' first opinion was that the hypothetical facts allowed him to "conclude that a search was conducted" (45, ll. 9-10). Of course, Sears, speaking as an attorney, was addressing the legal definition of "search" rather than a lay understanding of the term.

Thereafter, Sears discussed the *per se* unreasonableness of warrantless entries, whether there was a consentual search, whether there was proper authority to consent to the search and whether a search was unlawful (45, ll. 16-24). In response to being asked to assume that "the presence of the police officer and the document [the writ of possession] had a great effect on . . . [the] decision to let them in the building," Sears said that this would "reinforce my opinion" (47, l. 19 through 48, l. 4).

At this point in his direct examination Sears had instructed on legal elements necessary for determination of an unlawful Fourth Amendment search: there was no warrant, there was no consent, and there was state action because of the presence of the police officer.

Sears then was given a lengthy hypothetical regarding the search of Petitioners' home. At the end of the hypothetical, Sears responded with the legal conclusion that a search did take place (51, l. 12). This was not a factual conclusion a non-lawyer would give, but was premised upon his understanding of legal principles. He thereafter instructed further on the law of search and seizure by commencing a legal analysis of the assumed facts

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[2]Unless otherwise indicated, the remaining citations are to Vol. III, record below.

under the legal doctrines of search, probable cause, exigent circumstances, consent and colorable claim of authority, as he understood them to be (52, l. 19 through 53, l. 25). At no time did Sears resolve any factual issues as to what occurred in Petitioners' home or business. As with a medical expert, the facts given Sears were always assumed; but, unlike medical expert testimony, Sears did not explain matters of a sufficiently technical nature that would assist the jury in its determination of facts prior to applying the court-rendered law. Instead, Sears merely gave his rendition of the legal principles applicable to the assumed factual context.

Sears' testimony pursuant to direct examination continued with his legal conclusions that "all persons that entered the premises conducted a search" (55, ll. 2-3), that this search was unlawful (55, l. 13), and that the "plain-view doctrine" exception did not apply (55, ll. 14-19). Again, none of these were factual conclusions but were legal conclusions based upon his understanding of the law as applied to the assumed facts.

Sears then testified that his opinion that the search was unlawful "would change only if I knew Mrs. Specht knew she had a right to refuse their entry, . . . if she was fully aware of all attendant rights, including the right to refuse their entry and . . . [that she was not] faced with a colorable claim of authority" (55, ll. 23 through 56, l. 5).[3]

[3]This opinion was contrary to this Court's holding in *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973); and *United*

(Continued on following page)

Finally, Sears' direct testimony concluded with his legal opinion that "it was the joint activity of all persons who entered the premises" (57, ll. 19-20). Sears' reference to "joint activity," another legal doctrine, required Respondents' counsel on cross-examination to inquire into Sears' understanding of the law upon which he based his conclusion that "joint activity" existed. Sears affirmed that "if a law enforcement officer merely facilitates the search," that that violates the Fourth Amendment (137, ll. 22 through 138, l. 2). This also was not the law[4] and was contrary to the court's instructions. Sears' finding of joint activity based upon a misconception of the law prejudiced Respondent officers because without joint activity, the acts of the private citizens could not be imputed to the Respondent officers. Thus, there would be no requisite "state action" to make a search unlawful under the Fourth Amendment.

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States v. Watson, 423 U.S. 411 (1976). The prejudice resulting from Sears' erroneous instruction on the law was further compounded by the trial court's erroneous refusal to permit cross-examination of Sears' legal error by citing case authority (see 65, ll. 10-15). *In Hart-Anderson v. Hauck*, 748 P.2d 937, 943 (Mont. 1988), the court held that it was error for the trial court to permit an attorney to give his legal opinion; and where such testimony was allowed, under Rule 705 it was further error to preclude cross-examination of the witness regarding case law inconsistent with his opinions.

[4]*See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

In an analogous context, courts have permitted expert testimony involving limited use of legal terms where such terms are within the common understanding of a juror; however, testimony that includes words which have a specific legal meaning not within common understanding is not permitted. *See Torres supra,* 758 F.2d 147 at 151 ("The best resolution of this type of problem is to determine whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular. If they do, exclusion is appropriate"); *Davis v. Combustion Engineering, Inc.,* 742 F.2d 916, 919-20 (6th Cir. 1984) (testimony that plaintiff was terminated because of age is admissible but testimony involving an opinion regarding "unlawful" age discrimination is inadmissible; however, because testimony on this letter point was slight, error was harmless); *United States v. Hearst,* 563 F.2d 1331, 1351 (9th Cir. 1977) (interpreted the Advisory Committee's exclusion of opinions phrased in terms of "inadequately explored legal criteria" as referring to terminology, "the meaning of which is not reasonably clear to laymen").

This principle distinguishes Respondent Officer Owens' testimony regarding whether a search took place from that of Attorney Sears. Contrary to Petitioners' argument (*see* Pet. 12), Owens' testimony was of an entirely different character than Sears' testimony. Officer Owens testified as follows:

> Question: If you didn't think . . . [the private citizen] had the power to do those things [*i.e.*, search the residence], when you were inside the Specht residence and [the citizen] . . . said, "We have a court order to search the residence," why didn't you interrupt and say, "No, you don't"?

Answer: He was making no attempt to search anything, so I made no attempt to explain the situation.

(Vol. VIII, 769) Obviously, Owens was using the term "search" in its lay sense: he believed that no one was looking through rooms, looking under objects, looking behind doors, or doing other such things that lay people would characterize as a search. This testimony was permissible because Owens aided the jury in determining factually what conduct the men pursued while they were inside Petitioners' residence; it did not provide a legal characterization of that conduct. Consequently, Owens' testimony was purely factual and admissible.

On the other hand, Sears' testimony began where Owens' testimony concluded. Sears was instructed to assume what conduct the actors pursued after which he applied the legal characterizations of "search" and "unlawful search." This is a perfect example of an unadorned legal conclusion. Or, applying the rationale of *Hearst*, 563 F.2d at 1351, Sears set forth "inadequately explored legal criteria" because the jury had no independent understanding of Sears' legal terms.

Petitioners have cited no case similar to the instant case in which an attorney expounds on constitutional principles. Petitioners instead cite cases in which an expert renders an opinion that, to the extent it may involve a legal principle, is nonetheless in terms susceptable to lay understanding or in the context of explaining a course of conduct.

Petitioners' arguments that their due process and equal protection rights have been violated by the *en*

banc court's decision (Pet. 6), and that the Tenth Circuit opinion has "prohibited the use of a hypothetical as the basis for an expert opinion" (Pet. 13), are groundless. The court below merely noted that because the legal expert assumed hypotheticals and did not attempt to resolve factual issues, *see* Pet. 47, n.5, this demonstrated that the expert did not resolve factual issues. The Tenth Circuit did not intimate in any way that the use of hypotheticals upon which an expert could base his opinion was hereafter prohibited.

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III. CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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